

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 02 2004
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
RX DEPOT, INC. and RX OF)
CANADA, LLC, corporations, and)
CARL MOORE and DAVID PEOPLES,)
individuals,)
)
Defendants.)

NO. 03-CV-616-EA (M) ✓

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AS TO DEFENDANTS' COUNTERCLAIMS WITH BRIEF IN SUPPORT

Plaintiff, the United States of America, through its undersigned attorneys, moves for summary judgment pursuant to Fed. Rule Civ. P. 56(b) as to the Defendants' counterclaims. Plaintiff previously filed a Motion for Summary Judgment as to its own claims¹ and a subsequent reply to the Defendants' response to that motion. See Dkt. # 46-50. For the same reasons expressed in those pleadings, Plaintiff seeks summary judgment with regard the counterclaims stated in the Defendants' Answer and modified by Defendants' Motion to Amend Answer and Counterclaims.

In the "Counterclaims for Injunctive Relief" section of their Answer, the Defendants claim that: 1) FDA's conduct "unduly burdens interstate commerce" through a "discriminatory policy of

¹That motion inadvertently cited Fed. Rule Civ. P. 56(b) rather than 56(a).

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selective enforcement," 2) that enforcement of FDA regulations denies the Defendants rights guaranteed by the Privileges and Immunities Clause, 3) that FDA's enforcement action is prohibited by the Equal Protection Clause, and 4) that FDA's actions violate the Defendants' First Amendment rights. See Def. Ans. (Dkt. # 14) at 7-10. Plaintiff has addressed each of these points previously, and none merit additional discussion. See Pl. Mot. for Summ. Jmt. (Dkt. # 46) at 11, Pl. Reply (Dkt. # 50) at 4-5, 6-8; see also United States v. Rx Depot et al., 290 F. Supp.2d 1238 (N.D. Okla. 2003), "Conclusions of Law" at ¶¶19-26. Defendants themselves have acknowledged that "FDA has the Congressional authority to ban these Canadian-imported drugs altogether for the purpose of public safety." Def. Resp. to Pl. Mot. for Summ. Jmt. (Dkt. # 49) at 16.

For the reasons cited above and in the government's previous pleadings, and for the reasons outlined by the Court in its November 6, 2003, Order, Plaintiff respectfully requests that summary judgment be granted in favor of the United States with respect to the Defendants' counterclaims. There exists no genuine issue of material fact regarding these claims, and Plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

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United States Department of
Health and Human Services
Office of the General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTERCLAIMS WITH
BRIEF IN SUPPORT was sent via facsimile and first class mail this
2nd day of June, 2004, to the following:

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